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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN BISSELL; MAUREEN LEE BISSELL,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; JAY DEIST; KIM WEST DEIST; MARY ANN FLETCHER; DAN GLICKMAN, in his capacity as Secretary of the U.S. Department of Agriculture,

Defendants - Appellees.

No. 01-35524

D.C. No. CV-98-00173-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted February 7, 2003**
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: KLEINFELD, McKEOWN, Circuit Judges, and BREYER, District Judge.[***]

Appellants Maureen and Alan Bissell allege that members of the United States Forest Service committed various torts around their property in Columbia Falls, Montana as part of an ongoing campaign of harassment. The Bissells contend, on appeal, that the district court erred in granting summary judgment to the appellees and in denying the Bissells an adequate opportunity to take discovery.

Grants of summary judgment, which we review de novo, are appropriate where, "after adequate time for discovery and upon motion," a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The district court concluded that summary judgment was warranted here because the only evidence the Bissells have to support their claim is their own belief, via sworn affidavits, that Jay Deist and Kim West Deist ("the Deists") were responsible for incursions against their property.

[***] The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

Summary judgment is not justified, however, where the claimants have presented direct evidence, in the form of sworn eyewitness accounts, of a central fact in dispute. See McLaughlin v. Liu, 849 F.2d 1205, 1208 (9th Cir. 1988). Although the Bissells' account of the facts may appear on its face to be unlikely, their claims are not altogether implausible, even when viewed against the direct evidence submitted by the Deists. This case presents a classic instance of disputed facts. The only way to rule in favor of the federal appellees at this stage is to disregard the eyewitness and other testimony provided by the Deists. By discounting the Bissells' direct evidence, the district court improperly weighed the evidence in favor of the appellees. See Bui v. AT&T, 310 F.3d 1143, 1153 (9th Cir. 2002). Accordingly, we reverse the district court's order granting summary judgment.

"Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." Goehring v. Brophy, 94 F.3d 1294, 1305 (9th Cir. 1996) (internal quotation and citation omitted). The Bissells have not demonstrated that any of the discovery they were denied would have tended to prove that the Deists were on the Bissells' property on the nights in question.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Appellants Maureen and Alan Bissell are awarded costs on appeal.